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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE RON MCINNIS, Defendant and Appellant.	H033019 (Santa Clara County Super. Ct. No. CC630860)

Lawrence Ron McInnis was convicted by a jury of attempting to bribe witnesses to keep them from testifying at his nephew's trial for robbery and kidnapping. On appeal, he contends that the judgment should be reversed because of "outrageous governmental conduct" by a police investigating officer. Appellant further contends that the trial court abused its discretion in denying his motion to disqualify the prosecutor based on a conflict of interest. We will affirm the judgment.

Background

Appellant's nephew, Julian Lowe, committed two robbery/kidnappings together with Mark Clennell. On the first occasion, in December 2003 around midnight, the victim, Martin Correa, had stopped to withdraw some cash at an ATM in Sunnyvale. The second occurred near midnight in early January 2004, at a Santa Clara children's center where the victim, Melchor Ancheta, was working as a janitor. Lowe's family hired Jaime Leanos and Paul Upton to represent Lowe in the criminal proceedings against him.

Upton and David Boyd, the prosecutor, developed a "heated" and "angry" relationship and the litigation thus became "unpleasant" and "acrimonious."

Neither victim testified at the preliminary hearing, but each was subpoenaed for trial in Lowe's case. On June 18, 2005, before he was to testify, Melchor Ancheta received a letter in his mailbox from "A Concerned Citizen for Fair and Equal Justice," along with an article about a case involving Kobe Bryant and $1,000 in cash. The author professed to "formally apologize for the trauma you suffered as a result of being robbed of your possessions last year." He said the defendants were "truly remorseful" for their "stupid immature mistake." He decried the prospect of the defendants' receiving life sentences "when no one was physically harmed, shot, or stabbed, which is something that they would never do." The letter continued, "The purpose of this letter and **its contents** is to compensate you for your initial loss that occurred as a result of the robbery. I believe you have at least **1 Thousand** reasons to be compensated for your pain and suffering. However, I feel that because **you are the true victim** in this crime, **you deserve much more compensation** for your pain and suffering. While it's obvious that the defendants don't have the ability to adequately compensate you, I do have the ability to do so on their behalf." The author compared this situation with the Kobe Bryant case, in which the victim elected not to testify and instead filed a civil suit, which the parties settled. The letter concluded, "Obviously this correspondence and agreement has to be kept confidential and **not disclosed** or shared with the District Attorney or Police. . . . Remember the District Attorney works for the people (you & me) and you have every right to tell the DA you don't want to testify and he can't force or threaten you to." The author gave Ancheta a number to call and leave a message stating that he agreed "that there are at least **25 thousand** reasons why you would like to **immediately** settle the case in a civil manner instead of being a witness in a criminal court." He was also given the alternative options of contacting the defendants' attorneys and requesting to settle the

case civilly, or hiring an attorney to discuss a civil settlement with the defense attorneys. Whichever option Ancheta chose, the author would pay the settlement amount and all of Ancheta's attorney fees.

Ancheta called the prosecuting attorney and turned the contents over to the police, who began an investigation. Meanwhile, on July 1, 2005, shortly before testimony was to begin in Lowe's trial, Ancheta received a second letter. In this letter the author cautioned "Mel" that the district attorney "is going to try and pressure you but stay strong, it's your right to NOT testify. [¶] Don't tell them about your offer. I am trying to save these kids lives." Attached to the letter was a "Civil Settlement Agreement," which instructed Ancheta to call the cell phone number to accept the agreement, which would be on the "terms in our previous communications." He would then receive $25,000 in cash from "Citizens For Fair & Equal Justice." The agreement would be invalid, however, "if it or any documents or communications associated with this agreement are shared with any law enforcement officials." Ancheta again turned these materials over to the police, and on July 7, 2005, he testified at Lowe's trial.

Martin Correa received similar communications. A few weeks before he was due to appear in court, he received a letter in the mail identical to the first one Ancheta had received, along with a copy of the Kobe Bryant article and $1,000 in cash. Correa gave the money and the letter and article to Sergeant Brian Gilbert, a police detective who was investigating the robbery and kidnapping, and who was attempting to trace the source of the letter to Ancheta. On July 4, 2005, the day before he was to testify, Correa received a second letter at his home, this time with a "civil settlement agreement" for a $50,000 cash payment in exchange for his refusal to testify. Again the author warned Correa that the district attorney would try to "pressure" him but he should "tell them you don't want to testify. Don't let them try to intimidate you into going to court." The author added that

the defendants had already spent 20 months in jail but did not "deserve to spend the rest of their lives in jail for a stupid mistake."

Correa did appear in court, but the prosecutor did not call him to testify. After Ancheta testified on July 7, 2005, Lowe pleaded guilty to two counts of robbery and two counts of simple kidnapping and was sentenced to prison. Earlier that day the prosecutor had advised the court and defense counsel that there had been an attempt to bribe the victims.

Appellant was arrested the same day, July 7, 2005, while he was traveling to court. During the ensuing interview with Sergeant Gilbert, appellant insisted that he had nothing to do with the letters, even though the sergeant suggested the possibility that appellant had only offered a legitimate business deal without intending to intimidate or threaten the victims. After the interview, the officers released him.

Sergeant Gilbert had begun investigating the source of the first letters on June 21, 2005, the day after learning that the victims had each received one. He enlisted the assistance of Officer Wahid Kazem to call the phone number provided in the letters. Officer Kazem pretended to be Melchor Ancheta and left a voice mail inquiring about the offer. During that week he left between five and 10 messages. On July 2 he received a call from appellant asking whether "Mel" had any questions. On July 3 appellant sent Kazem a text message saying, "Leave me a message with your questions. I am going to send the money, I swear." At about 8:30 a.m. on July 5, 2005, when opening statements and testimony were expected to begin, appellant called Kazem again and told "Mel," "Don't go to court."

Meanwhile, Sergeant Gilbert traced the purchase of the cell phone and the number. The Virgin Mobile phone had been purchased by "Joe Gift" on June 5 from a Radio Shack store, and activated a short distance away, at a FedEx Kinko's. Virgin Mobile indicated that the cell phone number had been activated on June 14 at 2:26 p.m. by

someone using a false name and address and using an e-mail address of fairjustice4all@yahoo.com. Sergeant Gilbert used a "Yahoo! Emergency Disclosure Request Form" to ascertain the identity of the subscriber. The information he obtained from Yahoo! indicated that fairjustice4all claimed to be Jane Doe, from Beverly Hills. The IP address, however, was traceable to a FedEx Kinko's in Los Gatos. From FedEx Kinko's he obtained surveillance videotape from which he made photographs of a person using a rental computer and making photocopies. At court on July 5, Sergeant Gilbert saw that appellant looked like the person in the photographs.[1]

Appellant was arrested for the second time on June 1, 2006. Although he admitted to the police that he was depicted in the FedEx Kinko's photographs, he again insisted he "had nothing to do with sending any letters to any victims or opening any accounts with Virgin Mobile, activating any cell phones." Appellant was charged thereafter with four counts of offering a bribe to dissuade a person from attending a trial, in violation of section 138, subdivision (a), and two counts of attempting to dissuade a witness from testifying, in violation of section 136.1, subdivision (a).

At his trial appellant candidly admitted writing the letters. He explained that he had wanted "to see if the victims were interested in working out a civil agreement" and had not believed he was committing a crime. He believed his nephew had committed "a terrible crime" and should be "punished severely" by spending significant time in prison. He was concerned, however, that Lowe might receive a life sentence, because he understood that the prosecutor had amended the charges from simple kidnapping to kidnapping for extortion. Appellant explained that he was angry at the prosecutor's amendment, which he perceived as an attempt to sidestep the insufficiency of the

[1] The parties stipulated that appellant was the person in the photographs.

distances the victims were moved.[2] He was also disturbed by the increasing level of hostility that was evident in the relationship between the defense attorneys and the prosecutor.

Appellant explained that before writing the letters to the victims he did extensive Internet research, during which he found an article discussing the case involving Kobe Bryant. His research led him to believe that he could legally propose a civil compromise. He consulted a criminal defense lawyer, Diane Nadler, who advised him first to enlist the cooperation of the defendants and all the attorneys, particularly the prosecutor. Appellant did not believe the prosecutor would be cooperative, however; he thought it more effective to ascertain the victims' interest and then have them work with the prosecutor to pursue the settlement.

Appellant readily admitted that he obtained an e-mail account and a cell phone for the purpose of communicating anonymously with the victims. In the letters, however, he was only trying to express how sorry the family was. He did not want the police or district attorney to learn about his letters because they might "try to stop the deal." By hiding his identity, he was not trying to prevent them from being traceable to him; he was only trying to "make it a little difficult," so that the victims could consider the offer before the district attorney or police got involved. He was not concerned about being discovered because he believed that what he was doing was completely legal.

Appellant had been attending each of Lowe's court proceedings since late April of 2005, but it was June 20, 2005, when David Boyd, the prosecutor, asked defense counsel to identify the two spectators in the courtroom. They were appellant and his sister. The next day appellant received a message on his cell phone, purportedly from "Mel Ancheta." At his trial appellant testified that he was suspicious because of the timing of

[2] Appellant himself had taken measurements at the crime scenes and determined that the police had inaccurately estimated those distances.

the message, because the voice in the message did not sound like the voice he had heard on the tape of Ancheta's 911 call, and because the area code of the caller was not the same as that of Ancheta's home. The caller said he had borrowed a cell phone from his employer, but appellant was still "very suspicious" that one or both victims had contacted the police about the letters.

Nevertheless, appellant decided that he needed "to be explicit" about settling the case civilly, and he wanted to demonstrate that he was intending a "legitimate legal business agreement," not a threat. In his second letter to each victim he pretended he did not think the police were involved. Appellant left the second letter to Correa on his doorstep.

The jury convicted appellant of the section 138, subdivision (a), violation (offering a bribe) as to both victims (counts 3 and 4), and of the section 136.1 violation (attempting to dissuade a witness from testifying) as to Ancheta (count 6). On the remaining counts the jury found appellant not guilty. The trial court suspended imposition of sentence and placed appellant on three years' formal probation.

Discussion

1. Dismissal for Outrageous Government Conduct

Before trial appellant moved to dismiss the information or suppress evidence obtained after Sergeant Gilbert submitted the Emergency Disclosure Request Form to Yahoo!. The court denied the motion. Appellant contends that the charges should have been dismissed because Sergeant Gilbert had obtained his identity from Yahoo! by committing perjury on the disclosure request form. This conduct, appellant argues, was so "outrageous" that his right to due process was violated, thus compelling reversal.

Sergeant Gilbert completed the Emergency Disclosure Request Form in order to learn the identity of fairjustice4all@yahoo.com, the address given by the cell phone purchaser. On the form Yahoo! stated that it would "exercise[e] its discretion" to

disclose the requested information based on the answers to five questions. The first three questions asked "the nature of the emergency involving death or serious physical injury," who was being threatened, and why the threatened conduct was imminent. Sergeant Gilbert wrote, "Two victims of a kidnapping/robbery have been contacted at their residences and threatened by the suspect associated to [*sic*] this Yahoo account." Both the victims and their families were being threatened, he said. The fourth question asked why the "normal disclosure process," including statutory emergency procedures, would be insufficient. Sergeant Gilbert responded that "the suspects have been to the victims['] residences. The victims have not complied with the suspects['] instructions and we believe retaliation will occur within the next 24 hrs." Because the "suspects" knew where the victims and their families lived, "[a]ny further delay in identifying the suspects will increase the danger to the victims and their families." Sergeant Gilbert answered the fifth question by describing the specific identifying information he was seeking. Before the signature line, the form stated: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." Sergeant Gilbert signed and submitted the form, and he received Yahoo!'s response about 20 minutes later.

In denying the motion to dismiss, the trial court found it "clear that Sergeant Gilbert engaged in hyperbole and exaggerated the danger to the victims as well as their families." Nevertheless, the court ruled, the officer's conduct "did not rise to the level of outrageous governmental conduct." Appellant maintains that the statements on the disclosure request form amounted to perjury; but even if they were only hyperbole they constituted outrageous conduct. We disagree.

"Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed." (*U.S. v. Montoya* (9th Cir. 1995) 45 F.3d 1286,

1300.)[3] Whether government conduct was so outrageous as to deprive a defendant of due process is an issue of law which we examine de novo. The trial court's factual findings, however, are viewed in the light most favorable to the court's ruling. (*U.S. v. McClelland* (9th Cir. 1995) 72 F.3d 717, 721.)

" 'For a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice.' [Citation.] This is an 'extremely high standard' for the defendant to meet." (*U.S. v. McClelland*, *supra*, 72 F.3d at p. 721.) Whether a police officer's conduct meets this "extremely high standard" does not depend on whether the suspect had made a criminal threat under section 422. Appellant cites no authority supporting such a proposition, and we decline to carve out a rigid criterion that would in some cases make it more difficult to show outrageous conduct. What is relevant here is that Sergeant Gilbert suggested that the "suspects" had made threats against the victims and their families, that the victims had not complied with the instructions of the "suspects," and that "retaliation" would occur within 24 hours. The scenario he depicted was exaggerated, perhaps even grossly so; at worst, he distorted the facts to the point of deliberate falsehood.[4] But the trial court found credible Sergeant

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[3] The claim of outrageous government conduct is characteristic of cases in which entrapment is alleged by the accused. (See, e.g., *U.S. v. Russell* (1973) 411 U.S. 423, 429 [93 S.Ct. 1637] [discussing entrapment defense in terms of luring otherwise innocent persons to commission of crimes and then punishing them]; *U.S. v. Ryan* (1976) 548 F.2d 782, 788-790 [police tactics used to obtain coconspirator's cooperation, "while not exemplary," did not fall within narrow "due process channel" left open in *Russell*]; but see *United States v. Tucker* (6th Cir. 1994) 28 F.3d 1420, 1427 [basis for entrapment defense lies in congressional intent, not the due process clause].)

[4] The parties debate the question of whether a declarant can legally commit perjury when he makes a statement to a private company in a request for disclosure of records. It is unnecessary to address this dispute, however. The definition of perjury in Penal Code section 118 requires a statement the declarant *knows* to be false, and its falsity must be established "by testimony of a single person other than the defendant." (Pen. Code, § 118.) If, as the trial court found, Sergeant Gilbert honestly believed that the letters

Gilbert's testimony that he believed the victims were actually in need of protection, that the letters contained "implied" threats, that imminent retaliation was a distinct possibility, and that the victims were "very emotional, "very fearful" when they received the letters. Ancheta in particular "was very upset . . . visibly shaken" about receiving the letters. Proper deference to the trial court's findings on the witness's credibility leads to the conclusion that the officer's conduct was not outrageous in light of his perception that immediate discovery of the author's identity was necessary.[5]

This case is not comparable to a conviction based directly on false testimony of a witness. (Cf. *Alcorta v. State of Tex*. (1957) 355 U.S. 28, 31 [78 S.Ct. 103] [in conviction for murder of defendant's wife, eyewitness's false testimony portraying casual relationship with victim was "seriously prejudicial" by refuting "sudden passion" defense].) Nor did Sergeant Gilbert engage in any acts that induced, encouraged, or facilitated appellant's own behavior, as in the typical "outrageous government conduct" cases involving entrapment. Indeed, appellant had already acted when the officer began the investigation. (Cf. *U.S. v. Russell*, *supra*, 411 U.S. at p. 432 [criminal enterprise already in process, with substance used to make methamphetamine obtainable independently of undercover agent's contribution].) "[T]he outrageous conduct defense is

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were threatening and that imminent retaliation was likely, there was no perjury. (Cf. *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [no instructional error where jury told that defendant could not be guilty of perjury if she honestly believed her statement to be true]; compare *People v. Webb* (1999) 74 Cal.App.4th 688, 694 [in conviction of theft by false pretenses, substantial evidence supported jury finding that appellant did not honestly hold the opinion or belief that his back pain was so severe that he required an in-home attendant].)

[5] Appellant makes much of the length of time it took Sergeant Gilbert to track the IP address to the FedEx Kinko's in Los Gatos. This point is relevant only as a factual dispute: that is, the delay shows that Sergeant Gilbert did not "truly" believe either victim to be in danger. The trial court, however, found the witness credible in his testimony that he believed the letters to be threatening.

generally unavailable where the criminal enterprise was already in progress before the government became involved or *where the defendant was involved in a continuing series of similar crimes during the government conduct at issue*." (*U.S. v. Stenberg* (9th Cir. 1986) 803 F.2d 422, 429; see *U.S. v. Bogart* (9th Cir. 1986) 783 F.2d 1428, 1437-1438, vacated in part on other grounds in *United States v. Wingender* (9th Cir.1986) 790 F.2d 802 ["the numerous cases refusing to apply the outrageous conduct defense invariably conclude that when the government conduct occurred the defendant was involved in a continuing series of similar crimes, or that the charged criminal enterprise was already in progress at the time the government agent became involved"]; see also *U.S. v. So* (9th Cir. 1985) 755 F.2d 1350, 1353-1354 [the government's providing the funds and opportunity to launder money was not so grossly shocking and outrageous as to violate the universal sense of justice].)

Viewing the issue presented in light of "the totality of the facts," as appellant urges we do (*U.S. v. Penn* (1980) 647 F.2d 876, 880; see also *U.S. v. Bogart*, *supra*, 1438 F.2d at p. 1438 ["[u]ltimately, every case must be resolved on its own particular facts"]), we agree with the trial court that the officer's conduct did not meet the "extremely high standard" necessary to warrant reversal for a due process violation.[6] "If the conduct of

[6] The theory that outrageous police conduct is necessarily a due process violation was questioned in *United States v. Tucker*, *supra*, 28 F.3d at pp. 1422-1427 ; see also *United States v. Payner* (1980) 447 U.S. 727, 737, n. 9 [100 S.Ct. 2439] [even if search was so outrageous as to offend fundamental canons of decency and fairness, due process violation does not occur unless the government activity violated some protected right of the defendant]; cf. *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 435 [dismissal proper after government intrusion into defendant's right to counsel of his choice].) Some courts have stated that even if police conduct does not rise to level of due process violation, a court may nonetheless dismiss information under its supervisory powers. (See, e.g., *U.S. v. Doe* (9th Cir. 1997) 125 F.3d 1249, 1253; but see *U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1239 ["To justify the exercise of the court's supervisory powers, however, prosecutorial misconduct must '(1) be flagrant and (2) cause "substantial prejudice" to the defendant.' [Citation]."])

[Sergeant Gilbert] was in some respects overzealous, it was clearly not 'so grossly shocking and so outrageous as to violate the universal sense of justice.' [Citation.]" (*U.S. v. Bagnariol* (1981) 665 F.2d 877, 883.)

Appellant further argues that Sergeant Gilbert "engaged in trickery and deception" by concealing the disclosure request from the court and the prosecution. There is no direct evidence that he deliberately sought to withhold evidence; he testified only that he did not give the district attorney the declaration that he had sent to Yahoo! and that he "probably" would not have turned it over if he had not been specifically asked for it. In any event, because appellant did not raise this point below as an independent ground for finding outrageous government conduct, the People had no opportunity to develop a factual and legal basis for opposition, and the trial court had no opportunity to evaluate the contention in light of the facts it found to be true.[7]

2. Motion to Disqualify Prosecutor

In July 2006, shortly after his second arrest, appellant moved under Penal Code section 1424 to disqualify the deputy district attorney, David Boyd. Appellant asserted that Boyd had a conflict of interest arising from his "personal interest" in prosecuting appellant and from the likelihood that he would be called as a witness for either side. According to appellant, Boyd had engaged in "egregious" litigation tactics in the Lowe/Clennell case. "[W]homever [*sic*] prepared these letters [to the victims] was well aware of . . . Boyd's tactics" and "has personally offended Mr. Boyd such that he has

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Some federal courts have also expressed the view that at least in entrapment cases, dismissal based on outrageous police conduct would constitute impermissible oversight of police practices, in violation of the separation of powers doctrine. (See, e.g., *United States v. Tucker, supra,* 28 F.3d at p. 1428.)

[7] Defense counsel did call attention to the failure to turn over the document, but that was after testimony had been completed in the motion to dismiss or suppress evidence, and it was cited to support the assertion that Sergeant Gilbert "knew what he put in that declaration was untrue."

seized the opportunity to prosecute this case despite the nature of the allegations not being within the ordinary scope of his duties. There is no question that Mr. Boyd would have an inherent conflict against whomever [*sic*] has called his integrity into question." Boyd had already overstepped his prosecutorial discretion, appellant argued, by "overcharging" this case without "a shred of evidence" to support the allegations. Now, because the author of the letters apparently was aware of and motivated by reaction to Boyd's tactics in prosecuting Lowe and Clennell, there was a "strong likelihood" that he could be a witness in McInnis's trial, which created a "direct conflict" making him "unable to proceed as a fair and impartial prosecutor."

A different deputy district attorney submitted opposition to the disqualification motion. The opposition contained item-by-item explanations of the facts and legal points refuting appellant's allegations of unethical conduct and conflict of interest. In addition, Boyd submitted a declaration contradicting certain factual allegations material to appellant's motion and asserting his intention to follow the rules of professional conduct. He stated, for example, that he was unaware that the police had overstated the distance Correa was moved; when he did learn of the error, he disclosed it to the defense and requested detailed measurements of both crime scenes. Boyd averred that he had no personal bias against appellant, and he was aware of no facts that would call for his appearance as a witness. If that situation arose, a different prosecutor could then be assigned to the case.

In a supplemental memorandum, the District Attorney emphasized that appellant had shown no conflict of interest (demonstrated by a personal or emotional involvement with the events or people in the case), or any "overriding bias" requiring the remedy of recusal. Even discovery error in the prior case did not justify recusal, she argued; any such error could not have affected Lowe's trial because there was no trial. And "just

because a prosecutor errs in one case, a court may not assume he or she will err again in another trial."

The court heard appellant's motion together with the District Attorney's request to recuse Jaime Leanos, one of Lowe's defense attorneys, from representing appellant in this case. Paul Upton, Lowe's other attorney, represented appellant in arguing that "multiple acts of prosecutorial misconduct" in the Lowe/Clennell case (including violating discovery rules and overcharging the defendants with aggravated kidnapping) gave "many family members and friends" a "strong and compelling motive" to dissuade a witness from testifying.

The court suggested that the anticipated defense sounded like "My client did it, but he did it for a good reason," whereas appellant was asserting that he "didn't do it." After extensive argument, the court denied appellant's motion. Boyd amended his own recusal request to disqualify Upton as well, as both defense attorneys had participated in the Lowe/Clennell case and had witnessed behavior that might be relevant in prosecuting appellant. The court agreed with Boyd that a conflict existed which appellant could not waive, and which prevented Leanos and Upton from representing appellant.

Appellant contends on appeal that the trial court abused its discretion by denying his motion based on errors of law and failure to recognize Boyd's "severe" conflict of interest. Appellant's grievance, however, is in essence with the court's reasoning in light of the facts. Appellant asserts that the court was "wrong" in suggesting that Boyd had an obligation to serve on the case and that if Boyd were called as a witness, he could be replaced by another prosecutor. In addition, appellant argues, Boyd could have been called to respond to the defense of overcharging; in that event, California Rules of Professional Conduct, rule 5-210 would have forbidden him to be both an advocate and a

witness in the same proceeding.[8] In appellant's view, Boyd's conflict of interest was demonstrated by his "personal interest or emotional involvement in [appellant's] case because it stemmed from the proceedings in the Lowe-Clennell case. His interaction with defense attorneys, particularly Upton, showed a particularly strong tendency to imply extraneous motivation on Boyd's part." Appellant points to several facts he believes demonstrated "retaliatory aggregate charging" and general animosity against Upton and Leanos "which could only spill over into McInnis's case." Appellant suggests further evidence of the court's abuse of discretion in its "double standard" in recusing Leanos and Upton.

Section 1424 provides the statutory ground for disqualifying a district attorney from prosecuting a case. The court may not grant a motion for such disqualification "unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen. Code, § 1424.) "Prosecutors are public fiduciaries. They are servants of the People, obliged to pursue impartially in each case the interests of justice and of the community as a whole. [Fn. omitted.] When conflicts arise that compromise their ability to do so, they can and should be recused. But defendants bear the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People's prerogative to select who is to represent them." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709.) "[A] 'conflict,' for purposes of section 1424, 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary

[8] This rule states: "A member shall not act as an advocate before a jury which will hear testimony from the member unless: [¶] (A) The testimony relates to an uncontested matter, or . . . [¶] (C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal."

function in an evenhanded manner. . . . [I]t warrants recusal only if 'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.' " (*People v. Eubanks* (1996) 14 Cal.4th 580, 592, quoting *People v. Conner* (1983) 34 Cal.3d 141, 148.) Both aspects of this standard must be considered: that is, the court must determine whether there is a conflict of interest, and if so, whether the conflict is "so severe as to disqualify the district attorney from acting." (*People v. Eubanks, supra,* 14 Cal.4th at p. 594.) "Thus, while a 'conflict' exists whenever there is a 'reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' " (*Ibid.*) The likelihood that the defendant will be deprived of fair treatment "must be real, not merely apparent," and must go beyond the mere appearance of impropriety. (*Id*. at pp. 592-593.)

On appeal, "[w]e must review the superior court's factual findings for substantial evidence and, based on those findings, determine whether the trial court abused its discretion in denying the recusal motion." (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 834.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court, supra,* 43 Cal.4th at pp. 711-712, fns. omitted.) "We review rulings on motions to recuse only for abuse of discretion precisely because trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few

briefs, a few minutes of oral argument, and a cold and often limited record." (*Id.* at p. 713.)

Given these firmly established standards, we find no abuse of discretion. The trial court was not convinced that Boyd had been so emotionally involved in the Lowe/Clennell case that he could not act impartially in this prosecution. Substantial evidence, including the declaration of Boyd himself, supports this factual determination, which undermines the premise of appellant's argument. Boyd recounted his experience in handling the prior litigation: he explained that he had disclosed the measurement error to the defense when it was discovered, he had obtained no exculpatory evidence that was not disclosed to the defense, he had no personal bias against appellant, and he was aware of no factual scenario that would require his testimony as a witness in appellant's trial. The trial court apparently found these statements credible and persuasive; it agreed with Boyd that in the unlikely event that Boyd was called to testify, another prosecutor would replace him on the case. This determination was not legally or factually erroneous. Nor did rule 5-210 of the Rules of Professional Conduct preclude Boyd's representation in this case. Even if the jury had been asked to hear Boyd's testimony (which in fact did not occur), Boyd could have continued serving as prosecutor if he had obtained the consent of the "head of the office" or the head's designee. (Rules of Professional Conduct, rule 5-210(c).) At trial, Boyd was not asked to testify, and the court was not called upon to rebuke him or examine his behavior for any excessive personal interest or undue bias in seeking appellant's conviction. Thus, the court properly ruled that appellant had failed to show a genuine, "severe," and "grave" conflict of interest that created a "real, not merely apparent," likelihood of unfair treatment by the prosecution.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.